MOTION FILED
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(7)

No. 99-1009

IN THE

Supreme Court of the United States

SUE HARRIS DEBAUCHE

Petitioner,

v.

EUGENE TRANI, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE APPLESEED ELECTORAL REFORM LAW PROJECT, THE COALITION ON FREE AND OPEN ELECTIONS AND THE CENTER FOR VOTING AND DEMOCRACY, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The Appleseed Electoral Reform Law Project, the Coalition on Free and Open Elections and the Center for Voting and Democracy hereby respectfully move the Honorable Court for leave to file the following brief amici curiae in this case. The consent of counsel for Petitioner has been obtained. The consent of counsel for Respondent Eugene Trani has also been obtained. The consent of counsel for Respondent Lawrence Douglas Wilder has been requested and refused. The consent of counsel for Respondent Central Virginia Educational Telecommunications Corporation and the consent of counsel for Respondent Clear Channel Radio have been requested and refused.[1]

The Appleseed Project on Electoral Reform at American University Washington College of Law, together with its sister project at Harvard Law School, works to support electoral reform and democratic rights in American politics. It engages in advocacy and scholarship on a broad range of electoral reform issues. It is a non-partisan project, and was launched in 1999 by the Appleseed Foundation, a national non-profit public interest law organization. As part of its

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[1] Counsel for Respondent Central Virginia Educational Telecommunications Corporation and Counsel for Respondent Clear Channel Radio both have refused consent on the grounds that Professor Jamin B. Raskin, who co-authored this *amicus* brief, was listed as of counsel to the plaintiff in the district court. Professor Raskin signed no pleadings, entered no appearance and received no compensation for the pro bono constitutional advice he rendered to plantiff's counsel in the district court. He has had no direct role in the appeal of this case. A professor of constitutional law and the First Amendment, Professor Raskin has long championed the rights of new political parties including those part of the Coalition represented here. He has also authored a law review article on the subject of debate exclusion. Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 7 (June 1999). In 1997, on behalf of Perot '96, he filed an *amicus* brief with the Court in support of Respondent in the case of *Arkansas Educational Television Commission v. Forbes*.

work, the Appleseed Project at American University seeks to promote broad and robust candidate debates and to prevent the unfair manipulation of public opinion by government and the official suppression of new voices and new choices in American politics. The views expressed in this motion and following brief are solely those of the Project at American University, and may not reflect the positions of the Harvard Appleseed Project, or of any other Appleseed Center or Project.

The Coalition on Free and Open Elections is a national alliance of minor political parties combating the self-entrenchment of incumbent political parties through the passage of restrictive ballot rules, debate gerrymandering and other unlawful practices.

The Center for Voting and Democracy is a non-partisan and non-profit corporation incorporated in the District of Columbia for educational purposes. The Center researches and distributes information on electoral systems that promote full voter participation and fair representation, particularly alternatives that will enable more voters to elect candidates of their choice than in plurality or in traditional at-large elections. The Center's mission is founded on the belief that implementing such voting systems would: restore vitality to our democracy; ensure fairer representation of our society's diversity in elected bodies; and assist local, state, and national governments in solving the complex problems facing our nation.

The Appleseed Project, the Coalition and the Center are submitting a brief amici curiae in support of Petitioner, Sue Harris DeBauche. All have an interest in strong enforcement of the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* so as to protect the First Amendment and Equal Protection rights of American citizens challenging entrenched political establishments in their states.

In light of the important issues being raised in this case, the Appleseed Project, the Coalition and the Center respectfully request that their arguments be heard.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

The Appleseed Project on Electoral Reform at American University Washington College of Law, together with its sister project at Harvard Law School, works to support electoral reform and democratic rights in American politics. It engages in advocacy and scholarship on a broad range of electoral reform issues. It is a non-partisan project, and was launched in 1999 by the Appleseed Foundation, a national non-profit public interest law organization. As part of its work, the Appleseed Project at American University seeks to promote broad and robust candidate debates and to prevent the unfair manipulation of public opinion by government and the official suppression of new voices and new choices in American politics. The views expressed in this brief are solely those of the Project at American University, and may not reflect the positions of the Harvard Appleseed Project, or of any other Appleseed Center or Project.

The Coalition on Free and Open Elections is a national coalition of minor political parties combating the self-entrenchment of incumbent political parties through the

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[1] Pursuant to Rule 37.6 of this Court, *amici* hereby represent that no person or entity, other than the named amici curiae, made any monetary contribution to the preparation and submission of this brief. One of the two attorneys who has prepared this *amicus* brief, Professor Jamin Raskin (who is Faculty Director of the Appleseed Project), acted in a *pro bono* of counsel capacity to the plaintiff in the district court. He has had no direct involvement in her case on the appellate level. A professor of constitutional law and the First Amendment, Professor Raskin has long championed the rights of new political parties. He has had also authored a law review article on the subject of debate exclusion. Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 7 (June 1999). In 1997, on behalf of Perot '96, he filed an *amicus* brief with the Court in support of Respondent in the case of *Arkansas Educational Television Commission v. Forbes*.

passage of restrictive ballot rules, debate gerrymandering and other unlawful practices.

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The Appleseed Project, the Coalition and the Center all have an interest in strong enforcement of the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* so as to protect the First Amendment and Equal Protection rights of American citizens challenging entrenched political establishments in their states.

SUMMARY OF ARGUMENT

With Independents the fastest-growing segment of the registered electorate, the judicial role in guaranteeing viewpoint-neutral and non-discriminatory access to government-run debates is critical to the success of outsider parties and indispensable to a meaningful choice for America's voters. The District Court's summary dismissal of Sue Harris DeBauche's challenge to the decision to exclude her from a government-run debate is a naked violation of the principles set out in *Arkansas Educational Television Commission v. Forbes* and a dangerous message to send to government debate sponsors in this election year.

ARGUMENT

I. AS AN INCREASING NUMBER OF GOVERNORS FROM OUTSIDE THE DEMOCRATIC AND REPUBLICAN PARTIES ARE ELECTED, THE JUDICIAL ROLE IN GUARANTEEING VIEWPOINT-NEUTRAL AND NON-DISCRIMINATORY ACCESS TO GOVERNMENT-SPONSORED DEBATES BECOMES CRITICAL NOT ONLY TO THE FORTUNES OF OUTSIDER CANDIDATES BUT TO THE FREE DEVELOPMENT OF AMERICAN DEMOCRACY.

In a constitutional sense, the United States has no "two-party system." [2] The Constitution does not mention political parties at all, much less bestow a title of nobility on any particular party.[3]

In a political sense, however, there are two large and dominant parties in the United States today. The Supreme Court decided in *Forbes* that those two parties could not exploit their control over the offices of governmental power to set up taxpayer-funded debates that deliberately exclude third-party candidates who may threaten the ideological and political interests of the two established parties.[4]

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[2] Of course, even if we were to legislate a "two-party system," it would be unconstitutional to legislate a Democratic-Republican party system. In this sense, the self-entrenchment of two particular parties is even more unlawful than the design of a system that would allow any two parties to come to power.

[3] The Constitution forbids the granting of Titles of Nobility. *See* U.S. Constit. Art. I, Section 9, Cl. 8.

[4] In the case of the Arkansas Educational Television Commission itself, the Court found that, based on extensive District Court factual findings, there had been no collusive political effort between the Democratic and Republican parties to gerrymander the debates. *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666, 683 (1998).

This principle could not be more timely or important for America's growing Independent and third-party movement. *See* R.W. Apple Jr., *The 2000 Campaign: The Swing Vote; Independents' Ballots Hold Promise for McCain and Bradley in Future Primaries*, N.Y. Times, Feb. 3, 2000 at A24 ("About 15 percent of national registration is independent, up from less than 1 percent 40 years ago, and that does not take into account the large number of states with no party registration."). During the last decade, the United States has witnessed the election of an Independent, Bernie Sanders, as Vermont's sole Representative to the U.S. House of Representatives and, even more significantly for this case, the election of four state Governors outside of the "two-party system" — Angus King of Maine, Lowell Weicker of Connecticut, Wally Hickel of Alaska and Jesse Ventura of Minnesota.[5]

These four popular governors may represent the groundswell of successful outsider candidates to come.[6] Independents represent the fastest-growing segment of the American electorate and have begun to make the critical

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[5] Angus King was elected to office in 1994 (Michael Barone and Grant Ujifusa, Almanac of American Politics 727 (2000)), Lowell Weicker served as Governor of Connecticut from 1990-1994 (Barone and Ujifusa, Almanac of American Politics 299-300 (1998), Walter Hickel served as Governor of Alaska from 1990 – 1994 (Id. at 78), and Jesse Ventura was elected to office in 1998 (Barone and Ujifusa, Almanac of American Politics 866 (2000).

[6] *See* A. Jay Higgins, *King Wants Second Term as Governor*, Portland Press Herald, Oct. 9, 1997 at 1A ("A statewide poll of 450 likely voters . . . gave King an 81 percent approval rating"); *Ventura's Approval Rating on Rebound*, The Bulletin's Frontrunner, Jan. 13, 2000 ("more than two-thirds of Minnesotans—68 percent—say they approve of Ventura's performance."); *Weicker's Ratings Rise To Highest Point For 1993*, The Hartford Courant, May 22, 1993 at B1 (citing a recent poll in which he received a seven point jump in approval ratings).

difference in elections across the country.[7] In the recent 2000 New Hampshire presidential primary, the nation took note of the fact that there were more Independents registered in New Hampshire than Democrats or Republicans, and numerous observers attributed Senator John McCain's stunning first-place finish there to his strength among Independent voters, who turned out in unexpectedly large numbers to endorse the anti-establishment message of Senator McCain.[8] Indeed, many voters instinctively grasp that "political figures outside the two major parties have been fertile sources for new ideas and new programs" and that "many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (citations omitted).

Governors King and Weicker participated in televised debates prior to their election.[9] But the example of

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[7] Twenty-seven states and the District of Columbia have electoral systems where voters register as members of a particular party. In 1996, of these, 46.7 percent were registered Democrats, 33.8 percent were registered Republicans, and 20.5 percent were registered Independents, miscellaneous, or other third-party members. Ballot Access News at 5 (Richard Winger ed., Dec. 12, 1996). It appears that the number of registered Independents is rising in the 2000 election cycle. *See* Editorial, *New Hampshire's Wisdom*, Boston Globe, Feb. 2, 2000 at A22 (reporting that independent voters outnumbered registered Republicans for the first time, with Democrats running third). *See also* Marjorie Connelly, *A Look at Voting Patterns of 115 Demographic Groups in House Races*, N.Y. Times, Nov. 9, 1998 at A20 (for the last three elections independents have comprised "a little more than one-fourth of all voters").

[8] *See* Apple, *The 2000 Campaign: The Swing Vote; Independents' Ballots Hold Promise for McCain and Bradley in Future Primaries*, N.Y. Times, Feb. 3, 2000 at A24 ("Independents had a major impact on both parties' pivotal primary elections in New Hampshire").

[9] *See* Kirk Johnson, *3 in Connecticut Focus on Taxes in a TV Debate*, N.Y. Times, Oct. 2, 1990 at 6 *available in* 1990 WL 2021788 (Lowell Weicker participated in 1990 debates); *Brennan Oks 7th Debate, May Take Part in Eighth*, Bangor Daily News, Sept. 14, 1994 *available in* 1994 WL 5524942 (Angus King participated in eight planned debates in 1994).

DeBauche's colleague in the Reform Party, Jesse Ventura of Minnesota, is particularly instructive for understanding the centrality of debates to the fortunes of outsider candidates. A bald giant ex-pro wrestler, he was derided by the state political establishment as a frivolous candidate with no chance of winning. Ventura nonetheless debated on an equal basis with his Democratic and Republican opponents. After ten televised debates, the voters of Minnesota decided that Ventura was the superior candidate and sent him to the Governor's mansion, despite the fact that he had never held statewide office before and was representing a political party considered to be on the fringe. *See Spending Limits Helped Ventura Win*, The Washington Post, Nov. 5, 1998 (in the debates, "Ventura clearly shined, appealing to blue-collar workers and young people with his candor, compassion and anti-establishment pronouncements that gradually chipped away at his opponents' poll numbers."). Richard H. Pildes, *The Theory of Political Competition*, The Law and Economics of Elections, Symposium Commentary, 85 Va. L. Rev. 1605, 1618 (stating that Minnesota election laws, including Ventura's participation in all ten debates, played a major role in his election as Governor); CBS News Transcripts: FACE THE NATION, Jan. 9, 2000, Burrelle's Information Services (Gov. Ventura stating, "the moment I debated I went from 10 percent up to 37 percent in six weeks and won the election").

No one knows whether Sue Harris DeBauche could have won her campaign for Governor of Virginia had she not been excluded from a televised government-sponsored debate between her two opponents. No one knows whether her exclusion altered the outcome of the race by driving down her political support to the benefit of one of her opponents. And no one knows whether she would have forced her opponents to address issues they both would have preferred to ignore.[10]

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[10] *See* Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992, at 23 (before Perot reentered the 1992 presidential campaign, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the]

Fortunately, we do not have to speculate about what might have been in this case since the *Forbes* case gives us a neutral due process principle to implement in cases of government-sponsored debate exclusion. And that principle has clearly been violated here.

II. THE DISTRICT COURT'S SUMMARY DISMISSAL OF SUE HARRIS DEBAUCHE'S CHALLENGE TO THE DECISION TO EXCLUDE HER FROM A GOVERNMENT-RUN DEBATE IS A NAKED VIOLATION OF THE PRINCIPLES SET OUT IN FORBES AND A DANGEROUS MESSAGE TO SEND TO GOVERNMENT DEBATE SPONSORS IN THIS ELECTION YEAR.

The Supreme Court's decision in *Forbes* stands for the proposition that government actors may not exclude political candidates from government-funded or sponsored debates on the basis of their political viewpoint or the political threat that they may pose to either of the invited candidates. Debates like the ones in Arkansas or Virginia are nonpublic fora but must, nonetheless, respect one critical constitutional principle. "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Forbes* at 682 (citations omitted).

The question of whether state actors have excluded a candidate from a government-run debate on the basis of illegitimate political reasons is intensely fact-specific. Thus, in *Forbes*, the excluded candidate for Congress, Ralph Forbes, had the wide-open due process opportunity to conduct pre-trial discovery followed by a full jury trial on his claim that he was the victim of political viewpoint discrimination when he was excluded from the debate. A jury deliberated

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primal issues" of deficit reduction and generational equity, but Perot's candidacy made deficit reduction a central issue in the campaign).

and found that the decision to exclude him from the debates in Arkansas was based on reasonable grounds of journalistic discretion and not on "political pressure" based on Mr. Forbes' viewpoints. *Id.* at 683.

Justice Kennedy, in his meticulously detailed opinion for the *Forbes* majority, found that there was no viewpoint discrimination because the *trial jury* explicitly found that Forbes' exclusion from the debate was not based on "objections or opposition to his views." *Id.* (quoting the Appendix to the Petition for Certiorari 23a). Justice Kennedy further relied on the very specific courtroom testimony of the Executive Director of the Arkansas Educational Television Network, Susan Howarth. Justice Kennedy wrote of her testimony:

Forbes' views had "absolutely" no role in the decision to exclude him from the debate. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." . . . It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest. *Id.* at 682 (citations omitted) (brackets in original).

Sue Harris DeBauche received no trial and no discovery on her claim of political viewpoint discrimination as demanded by *Forbes*. She never had the opportunity to find out, much less to show the court, that her exclusion from the state-run debate was based on constitutionally impermissible criteria. The court was never able to make factual findings about why De Bauche was excluded. This is an especially egregious violation of the *Forbes* principle since the candidate

debate sponsor in Virginia had no formal criteria for selecting candidates and no formal process whatsoever to apply.

Unlike the Arkansas Educational Television Network, which had a professional staff and adopted the industry's Statement of Principles of Editorial Integrity in Public Broadcasting, the Virginia debate sponsors were flying by the seat of their pants. *Id.* at 669. When DeBauche became the balloted candidate of the Reform Party, she attempted to contact state employee and former Virginia Governor L. Douglas Wilder, the debate's coordinator, to seek a place in the debate. Wilder never responded to Sue Harris DeBauche's inquiries. She was unceremoniously shut out and never given any satisfactory explanation of why.

This outrageous process cannot stand under *Forbes*. If the District Court's cavalier—indeed hostile—treatment of DeBauche's First Amendment and Equal Protection rights is allowed to seep into the law, it will set a most dangerous precedent. Government debate sponsors all over the country will feel free simply to set up televised debates between favored candidates of incumbent parties and exclude outsiders. They will not even worry about working out formal and viewpoint-neutral criteria for debate participation, nor will they develop a fair process for applying such criteria. Like the debate sponsors in Virginia, they will act secretly, quickly, unaccountably and without any constitutional constraint to exclude outsider candidates. They will thus confer a major public subsidy—in both financial and symbolic terms—on the state-blessed insider candidates. They will know that the courts will simply wash their hands of such improper use of government power. So long Sue Harris DeBauche, so long Jesse Ventura.

CONCLUSION

For the above stated reasons, the Supreme Court should grant certiorari. It should make clear that district courts considering challenges to state actors excluding minor party candidates from debates must at least allow full discovery to

take place before dismissing these cases on summary judgment.

Respectfully submitted,

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